

**CONSULTANT AGREEMENT BETWEEN  
THE CITY OF SAN BRUNO AND \_\_\_\_\_**

**FOR**

\_\_\_\_\_  
THIS AGREEMENT, dated for convenience this \_\_\_\_ day of \_\_\_\_\_, 2003, is by and between \_\_\_\_\_ ("Consultant") and the CITY OF SAN BRUNO, a public body of the State of California ("City"):

**R E C I T A L S**

WHEREAS, Consultant is specially trained, experienced, and competent to perform the special services which will be required by this agreement; and

WHEREAS, Consultant is willing to render such professional services, as hereinafter defined, on the following terms and conditions; and

NOW, THEREFORE, Consultant and the City agree as follows:

**A G R E E M E N T:**

(1) Scope of Service. Consultant agrees to provide professional consulting services to install and license to City its software programs and to provide certain training, maintenance and other services related thereto. The scope of such services shall be as detailed in Attachment "A" and by reference is incorporated into this agreement.

(2) Compensation. City hereby agrees to pay Consultant on a time and expenses basis in accordance with the hourly billing rates set forth in Attachment "B" and incorporated herein by reference, such fee not to exceed \$\_\_\_\_\_.

(3) Effective Date and Term. The effective date of this agreement is as first stated above and it shall terminate after final completion of the project as determined by the City.

(4) Independent Contractor Status. It is expressly understood and agreed by both parties that Consultant, while engaged in carrying out and complying with any of the terms and conditions of this agreement, is an independent contractor and not an employee of the City of San Bruno. Consultant expressly warrants not to represent, at any time or in any manner, that Consultant is an employee of the City.

(5) Billings. Consultant shall submit progress billings on a monthly basis. Except as specifically authorized by City, Consultant shall not bill City for duplicate services performed by more than one person (reasonable quality control and assurance work as generally recognized as an acceptable practice in this field is excepted). Consultant's bill shall include the following information for the project: a brief description of services performed, the date the services were performed, the number of hours spent and by whom, a brief description of any costs incurred, percent completion to date of each task and subtask, total of prior billings, amount for billing period, total billing to date, and the Consultant's signature. In no event shall Consultant submit any billing for an amount in excess of the maximum amount of compensation provided in section (2) above.

(6) Advice and Status Reporting. Consultant shall provide the City with timely reports, orally or in writing, of all significant developments arising during performance of its services hereunder.

(7) Designation of Primary Provider of Services. This agreement contemplates the services of \_\_\_\_\_. The primary provider of the services called for by this agreement shall be \_\_\_\_\_, who shall not be replaced without the written consent of the City of San Bruno's Director of Public Works.

(8) Assignment of Personnel. Consultant shall assign only competent personnel to perform services pursuant to this agreement. If City asks Consultant to remove a person assigned to the work called for under this agreement, Consultant agrees to do so immediately regardless of the reason, or the lack of a reason, for City's request.

(9) Assignment and Subcontracting. It is recognized by the parties hereto that a substantial inducement to City for entering into this agreement was, and is, the qualifications and competence of Consultant. Neither this agreement nor any interest therein may be assigned by Consultant without the prior written approval of the City of San Bruno's Director of Public Works. Consultant shall not subcontract any portion of the performance contemplated and provided for herein without prior written approval of the City of San Bruno's Director of Public Works.

(10) Insurance. On or before beginning any of the services or work called for by any term of this agreement, Consultant, at its own cost and expense, shall carry,

maintain for the duration of the agreement, and provide proof thereof that is acceptable to the City the insurance specified in subsections (a) through (c) below with insurers and under forms of insurance satisfactory in all respects to the City of San Bruno.

Consultant shall not allow any subcontractor to commence work on any subcontract until all insurance required of the Consultant has also been obtained for the subcontractor.

- (a) Workers' Compensation. Statutory Workers' Compensation Insurance and Employer's Liability Insurance for any and all persons employed directly or indirectly by Consultant shall be provided with limits not less than one million dollars. In the alternative, Consultant may rely on a self-insurance program to meet these requirements so long as the program of self-insurance complies fully with the provisions of the California Labor Code. The insurer, if insurance is provided, or the Consultant, if a program of self-insurance is provided, shall waive all rights of subrogation against the City for loss arising from work performed under this agreement.
- (b) Commercial General and Automobile Liability. Consultant, at Consultant's own expense, shall maintain commercial general and automobile liability insurance for the period covered by this agreement in an amount not less than one million dollars per occurrence, combined single limit coverage for risks associated with the work contemplated by this agreement. If a Commercial General Liability Insurance or an Automobile Liability form or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the work to be performed under this agreement or the general aggregate limit shall be at least twice the required occurrence limit. Such coverage shall include but shall not be limited to, protection against claims arising from bodily and personal injury, including death resulting therefrom, and damage to property resulting from activities contemplated under this agreement, including the use of owned and non-owned automobiles.

Coverage shall be at least as broad as Insurance Services Office Commercial General Liability occurrence form CG 0001 (ed. 11/88) and Insurance Services Office Automobile Liability form CA 0001 (ed. 12/90) Code 1 (any auto). No endorsement shall be attached limiting the coverage.

Each of the following shall be included in the insurance coverage or added as an endorsement to the policy:

- (i) City, its officers, employees, agents, and volunteers are to be covered as insureds as respects each of the following: liability arising out of activities performed by or on behalf of Consultant, including the insured's general supervision of Consultant; products and completed operations of Consultant; premises owned, occupied or used by Consultant; or automobiles owned, leased, hired, or borrowed by Consultant. The coverage shall contain no special limitations on the scope of protection afforded to City, its officers, employees, agents or volunteers.
  - (ii) The insurance shall cover on an occurrence or an accident basis, and not on a claims made basis.
  - (iii) An endorsement must state that coverage is primary insurance and that no other insurance affected by the City will be called upon to contribute to a loss under the coverage.
  - (iv) Any failure of Consultant to comply with reporting provisions of the policy shall not affect coverage provided to City and its officers, employees, agents, and volunteers.
  - (v) Insurance is to be placed with California-admitted insurers with a Best's rating of no less than A:VII.
  - (vi) Notice of cancellation or non-renewal must be received by City at least thirty days prior to such change.
- (c) Professional Liability. Consultant, at Consultant's own cost and expense, shall maintain for the period covered by this agreement, professional liability insurance for licensed professionals performing work pursuant to this agreement in an amount not less than \$1,000,000 covering the licensed professionals' errors and omissions, as follows:
- (i) Any deductible or self-insured retention shall not exceed \$500,000 per claim without written approval thereof by the City Attorney.
  - (ii) Notice that cancellation must be received by the City at least thirty days prior to such change shall be included in the coverage or added as an endorsement to the policy.
  - (iii) The following provisions shall apply if the professional liability coverages are written on a claims made form:

1. The retroactive date of the policy must be shown and must be before the date of the agreement.
  2. Insurance must be maintained and evidence of insurance must be provided for at least five years after completion of the agreement or the work.
  3. If coverage is canceled or not renewed and it is not replaced with another claims made policy form with a retroactive date that precedes the date of this agreement, Consultant shall provide at its expense extended reporting coverage for a minimum of five years after completion of the agreement of the work.
  4. A copy of the claim reporting requirements must be submitted to the City prior to the commencement of any work under this agreement.
- (d) Deductibles and Self-Insured Retentions. Consultant shall disclose the self-insured retentions and deductibles before beginning any of the services or work called for by any term of this agreement. During the period covered by this agreement, upon express written authorization of City Attorney, Consultant may increase such deductibles or self-insured retentions with respect to City, its officers, employees, agents, and volunteers. The City Attorney may condition approval of an increase in deductible or self-insured retention levels upon a requirement that Consultant procure a bond guaranteeing payment of losses and related investigations, claim administration, and defense expenses that is satisfactory in all respects to each of them.
- (e) Notice of Reduction in Coverage. In the event that any coverage required under subsections (a), (b), or (c) of this section of the agreement is reduced, limited, or materially affected in any other manner, Consultant shall provide written notice to City at Consultant's earliest possible opportunity and in no case later than five days after Consultant is notified of the Change in coverage.
- (f) In addition to any other remedies the City may have if Consultant fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time herein required, City may, at its sole option:
- (i) Obtain such insurance and deduct and retain the amount of the premiums for such insurance from any sums due under the agreement;

- (ii) Order Consultant to stop work under this agreement or withhold any payment which becomes due to Consultant hereunder, or both stop work and withhold any payment, until Consultant demonstrates compliance with the requirements thereof;
- (iii) Terminate this agreement.

Exercise of any of the above remedies, however, is an alternative to other remedies the City may have and is not the exclusive remedy for Consultant's failure to maintain insurance or secure appropriate endorsements.

(11) Indemnification - Consultant's Responsibility. It is understood and agreed that Consultant has the technical skills necessary to perform the work agreed to be performed under this agreement, that City relies upon the skills of Consultant to do and perform Consultant's work in a skillful and professional manner, and Consultant thus agrees to so perform the work.

Acceptance by City of the work performed under this agreement does not operate as a release of said Consultant from responsibility for the work performed. It is further understood and agreed that Consultant is apprised of the scope of the work to be performed under this agreement and Consultant agrees that said work can and shall be performed in a fully competent manner.

Consultant shall indemnify, defend, and hold City, its officers, employees, agents, and volunteers harmless from and against any and all liability, claims, suits, actions, damages, and causes of action arising out of any personal injury, bodily injury, loss of life, or damage to property, or any violation of any federal, state, or municipal law or ordinance, or other cause to the extent arising from negligent or wrongful acts or omissions of Consultant, its employees, subcontractors, or agents, except for any such claim arising out of the active negligence, sole negligence, or willful misconduct of the City, its officers, employees, agents, or volunteers. It is understood that the duty of Consultant to indemnify and hold harmless includes the duty to defend as set forth in section 2778 of the California Civil Code. Acceptance of insurance certificates and endorsements required under this agreement does not relieve Consultant from liability under this indemnification and hold harmless clause. This indemnification and hold harmless clause shall apply whether or not such insurance policies shall have been determined to be applicable to any of such damages or claims for damages.

In addition to the general indemnification provided above, Consultant, at its own expense, will also specifically protect, defend and hold harmless City, its officers, employees, agents, and volunteers against any action brought against them based on

any claim that any software of the Consultant infringed a United States patent, copyright, trademark or service mark provided that (a) City promptly notify Consultant in writing of any notice of such claim; (b) Consultant shall have the control of the defense of any action on such claim and all negotiations for its settlement or compromise; provided, however, that Consultant shall not have any authority to negotiate any judgments for liability against the City; and (c) the City shall permit Consultant, at Consultant's option and expense, either to procure for the City the right to continue using the software or modify the software so that it becomes non-infringing.

(12) Warranties. Consultant warrants that (i) it may lawfully grant the license set forth in Exhibit \_\_\_\_ attached herein, (ii) neither the licensed software, including all subsequent versions, updates, enhancements and/or releases, nor licensed materials, or the use thereof within the scope of the License, infringes a patent or copyright or is claimed to be a trade secret of any person who has not consented to the granting of the License, (iii) at the time of installation, and for so long thereafter as City pays maintenance fees hereunder, the software, including all subsequent versions, updates, enhancements and/or releases, will conform to applicable printed documentation (i.e., all reference manuals) delivered by Consultant to the City (iv) neither the software, including all subsequent versions, updates, enhancements and/or releases, nor the licensed materials contain any virus, time bomb mechanism or other software or code that can disable or adversely affect any and all of the software or the licensed materials or destroy any data or other software. Consultant expressly warrants that its software is merchantable and is fit for the particular purpose for which it is being purchased and installed.

(13) Licenses. If a license of any kind, which term is intended to include evidence of registration, is required of Consultant, its employees, agents or subcontractors by federal or state law, Consultant warrants that such license has been obtained, is valid and in good standing, and Consultant shall keep it in effect at all times during the term of this agreement, and that any applicable bond has been posted in accordance with all applicable laws and regulations.

(14) Termination. In connection with the work to be performed by Consultant, City shall have the right to cancel or indefinitely suspend further work hereunder or terminate this Agreement upon thirty (30) days' written notice, and all work being performed under this Agreement shall immediately cease. In the event of a cancellation, termination, and suspension of this Agreement by City without cause or fault of Consultant, then City shall pay to Consultant an amount equivalent to the value of all services and work performed.

(15) Notices. Notices required by this agreement shall be personally delivered or mailed, postage prepaid, as follows:

To Consultant:

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To the City:

City Manager  
City of San Bruno  
567 El Camino Real  
San Bruno, CA 94066

Each party shall provide the other party with telephone and written notice of any change in address as soon as practicable.

Notices given by personal delivery shall be effective immediately. Notices given by mail shall be deemed to have been delivered forty-eight hours after having been deposited in the United States mail.

(16) Ownership of Materials. Any and all documents, including draft documents where completed documents are unavailable, or materials prepared or caused to be prepared by Consultant pursuant to this agreement shall be the property of the City at the moment of their completed preparation. All materials and records of a finished nature, such as final plans, specifications, reports, and maps, prepared or obtained in the performance of this agreement, shall be delivered to and become the property of the City. All materials of a preliminary nature, such as survey notes, sketches, preliminary plans, computations and other data, prepared or obtained in the performance of this agreement, shall be made available, upon request, to City at no additional charge and without restriction or limitation on their use consistent with the intent of the original design. Consultant shall be allowed to maintain one file copy of all materials and records prepared or obtained in performance of this Agreement. Consultant shall also make available a back-up copy of the most current version of all software and/or source code on-site with City so that City is able to re-install the software onto the City's system. Any reuse by City of such materials for purposes not consistent with the original design shall be at the City's sole risk and without liability to Consultant.

(17) Amendments. This agreement may be modified or amended only by a written document executed by both Consultant and City's City Manager and approved as to form by the City Attorney. Such document shall expressly state that it is intended by the parties to amend the terms and conditions of this agreement.

(18) Abandonment by Consultant. In the event the Consultant ceases performing services under this agreement or otherwise abandons the project prior to completing all of the services described in this agreement, Consultant shall, without



delay, deliver to City all materials and records prepared or obtained in the performance of this agreement, and shall be paid for the reasonable value of the services performed up to the time of cessation or abandonment, less a deduction for any damages or additional expenses which City incurs as a result of such cessation or abandonment.

(19) Waiver. The waiver by either party of a breach by the other of any provision of this agreement shall not constitute a continuing waiver or a waiver of any subsequent breach of either the same or a different provision of this agreement.

(20) No Third-party Rights. The parties intend not to create rights in, or to grant remedies to, any third party as a beneficiary of this agreement or of any duty, covenant, obligation, or undertaking established herein.

(21) Severability. Should any part of this agreement be declared by a final decision by a court or tribunal of competent jurisdiction to be unconstitutional, invalid, or beyond the authority of either party to enter into or carry out, such decision shall not affect the validity of the remainder of this agreement, which shall continue in full force and effect, provided that the remainder of this agreement, absent the unexcised portion, can be reasonably interpreted to give effect to the intentions of the parties.

(22) Compliance with Laws. In the performance of this agreement, Consultant shall abide by and conform to any and all applicable laws of the United States and the State of California, and the City Charter and all ordinances of the City. Consultant warrants that all work done under this agreement will be in compliance with all applicable safety rules, laws, statutes and practices, including but not limited to Cal/OSHA regulations.

(23) Controlling Law. This agreement and all matters relating to it shall be governed by the laws of the State of California.

(24) Conflict of Interest. Consultant warrants and covenants that Consultant presently has no interest in, nor shall any interest be hereinafter acquired in, any matter which will render the services required under the provisions of this agreement a violation of any applicable state, local, or federal law. In the event that any conflict of interest should nevertheless hereinafter arise, Consultant shall promptly notify City of the existence of such conflict of interest so that the City may determine whether to terminate this agreement. Consultant further warrants its compliance with the Political Reform Act (Gov. Code section 8100 et seq.) respecting this agreement. Consultant is not a 'public official' for purposes of Government Code section 87200 et seq. Consultant conducts research and arrives at conclusions with respect to his or her rendition of information, advice, recommendation or counsel independent of the control and direction of the City or any City official, other than normal, contract monitoring. In

addition, Consultant possesses no authority with respect to any City decision beyond the rendition of information, advice, recommendation or counsel."

(25) Copyright. Upon City's request, Consultant shall execute appropriate documents to assign to the City the copyright to work created pursuant to this agreement. The issuance of a patent or copyright to Consultant or any other person shall not affect City's rights to the materials and records prepared or obtained in the performance of this agreement. City reserves a license to use such materials and records without restriction or limitation consistent with the intent of the original design, and City shall not be required to pay any additional fee or royalty for such materials or records. The license reserved by City shall continue for a period of fifty years from the date of execution of this agreement unless extended by operation of law or otherwise.

(26) Time is of the Essence. Consultant agrees to diligently prosecute the services to be provided under this agreement to completion and in accordance with the schedule specified in Attachment "C". In the performance of this agreement, time is of the essence.

(27) Whole Agreement. This agreement has 11 pages excluding any exhibits described on its signature page. This agreement constitutes the entire understanding and agreement of the parties. This agreement integrates all of the terms and conditions mentioned herein or incidental hereto and supersedes all negotiations or previous agreements between the parties with respect to all or any part of the subject matter hereof.

(28) Multiple Copies of Agreement. Multiple copies of this agreement may be executed but the parties agree that the agreement on file in the office of City's City Clerk is the version of the agreement that shall take precedence should any differences exist among counterparts of the document.

(29) Delays in Progress. The Consultant is not responsible for damage or delay in performance caused by events beyond the control of the Consultant. In the event Consultant's services are suspended, delayed, or interrupted for the convenience of the City or delays occur beyond the control of the Consultant, an equitable adjustment in Consultant's time of performance and cost of Consultant's personnel and subcontractors shall be made.

(30) Revisions of Work Scope. City reserves the right to direct revision of Consultant's services as may be necessary. When Consultant is directed to make revisions under this section of the Agreement, Consultant shall advise City of the probable costs involved in completing services and the time of performance for such completion.

In the event City and Consultant cannot agree on equitable compensation for services rendered in making revisions, then, at City's option, Consultant shall either continue performance under the revised Agreement and an equitable adjustment in Consultant's time of performance and cost of Consultant's personnel shall be made at completion of the revised work, or Consultant shall not be obligated to continue performance under the revised Agreement.

(31) Outside Information and Services. The City shall furnish the Consultant available studies, reports and other data pertinent to Consultant's services; obtain or authorize Consultant to obtain or provide additional reports and data as required; furnish to Consultant services of others required for the performance of Consultant's services hereunder, and Consultant shall be entitled to use and rely upon all such information and services provided by City or others in performing Consultant's services under this Agreement.

(32) Access. The City shall arrange for access to public and private property as required for Consultant to perform services hereunder.

(33) Level of Competency. The Consultant shall be responsible to the level of competency presently maintained by other practicing information technology professionals performing the same or similar type of work at the time notice to proceed is issued.

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IN WITNESS WHEREOF, Consultant has executed this agreement, and the City, by its City Manager, who is authorized to do so, has executed this agreement.

CONSULTANT

\_\_\_\_\_, 2002

By: \_\_\_\_\_

Its: \_\_\_\_\_

\_\_\_\_\_, 2003

By: \_\_\_\_\_

Its: \_\_\_\_\_

Attach Corporate Seal  
or Notary and Jurat

CITY OF SAN BRUNO

\_\_\_\_\_, 2003  
(Council Action Dated \_\_\_\_\_)

By: \_\_\_\_\_

City Manager

Attest: \_\_\_\_\_

City Clerk

Approved as to form and  
procedure:

\_\_\_\_\_  
City Attorney

Attachments: "A" - Scope of Work  
"B" - Cost Summary and Hourly Billing Rate  
"C" - Schedule